IN THE

# United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & CO.,

*Petitioner,*

v.

CIVIL AERONAUTICS BOARD,
PAN AMERICAN AIRWAYS CORPORATION,
PAN AMERICAN AIRWAYS, INC.,
EASTERN AIR LINES, INC.,
NATIONAL AIRLINES, INC.,
CHICAGO AND SOUTHERN AIR LINES, INC.,
TACA, S. A.,
DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA,

and

PAN AMERICAN-GRACE AIRWAYS, INC.,

*Respondents.*

## PETITION OF EASTERN AIR LINES, INC. FOR REHEARING

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## PETITION OF EASTERN AIR LINES, INC. FOR REHEARING

### Preliminary Statement

Eastern Air Lines, Inc. ("Eastern") petitions the Court for rehearing with respect to the decision, dated January

28, 1946, in this proceeding. As we understand that decision, it appears to order the Civil Aeronautics Board:

1. To consider the "petition" of W. R. Grace & Co. under Docket 707 as an "application" filed on behalf of Panagra if the Board finds that Pan American Airways Corporation has acted "fraudulently" and "illegally" in refusing to permit Panagra to file an application; and

2. To consider and decide such "application", if it exists, as a part of the proceeding under Docket 779.

The Court has plainly indicated that the Board's decision was correct on the ground stated by the Board—namely, that the Board lacked the power under the Civil Aeronautics Act, in the absence of an application by Panagra, to *compel* an extension of Panagra's system 1200 miles to the United States in competition with Panagra's co-owner, Pan American. Grace objected to the Board's decision, before both the Board and this Court, *only* on the ground stated by the Board, conceding that no application had been filed by or on behalf of Panagra.

Under such circumstances, we submit that, for reasons set forth hereinafter, the Court should have affirmed the decision of the Board. Instead, the Court has itself suggested an objection to the Board's order *never suggested by any party* and directly contrary to the position taken by Grace. Such action by the Court is, we submit, improper and contrary to the express provisions of the Act.

The conclusions and reasoning of the Court are not supported by any of the facts or the law of this case, by the history of the proceeding under Docket 779, or by any objection raised by Grace before the Board or before this Court; they are directly contrary to the position taken by Grace throughout the proceeding before the Board and this

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Court; they are based on material not in the record and not subject to judicial notice; and they are contrary to the expert findings of the Board and contrary to well established rules of judicial review of administrative proceedings.

## I

### The Court Cannot Properly, on Review, Consider an Objection to the Board's Order Not Raised Before the Board, and in Fact Contrary to the Position of All Parties Before the Board and Before This Court.

It is plain that the Court has decided the case on a ground not presented to the Board and *never* suggested by any party to this proceeding.

The Court apparently has ruled that the Board erred in failing to consider the possibility that Grace's "petition" under Docket 707 was an "application" on behalf of Panagra which should be considered under Docket 779. A most diligent search of the record will reveal no suggestion by Grace or anyone else that such a construction could be placed on Docket 707. We shall point out later that the Board did hold that Docket 779 did *not* include any application on behalf of Panagra—a holding directly contrary to the suggestion of the Court. But the important fact at this point is that the objection which the Court has raised to the Board's order was never raised before the Board.

It is a well established rule, even in the absence of a statutory provision reinforcing it, that a reviewing court will not consider objections which were not presented to the administrative agency. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206 (1935); *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498 (1937). As the Supreme Court said in *Helvering* v. *Cement Investors*, 316 U. S. 527, 535 (1942):

> "We will not consider here for the first time * * * a question not fairly within the issues as framed by the Commissioner and hence not decided below."

This rule is closely allied to the one requiring a party to exhaust all administrative remedies before seeking judicial review—a rule based on the principle that the expert administrative agency should first rule on all points within its field. *United States* v. *Abilene etc. Ry.*, 265 U. S. 274 (1924); *Delaware etc. Co.* v. *United States*, 266 U. S. 438 (1925); *Beaumont etc. R. R.* v. *United States*, 282 U S. 74, 87 (1930); *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-52 (1938).

The usual rule forbidding consideration by the reviewing court of objections not raised before the administrative agency is greatly strengthened in this case by express statutory provision. Section 1006(e) of the Civil Aeronautics Act provides as follows:

> "No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

The language of this provision is clear on its face. Whatever power the Court may have in cases where no similar statute is involved, plainly it has no power on review of a decision of the Civil Aeronautics Board to raise *on its own motion* an objection not previously urged before the Board unless there were reasonable grounds for not urging such objection. Grace has advanced and could advance no reasons for not having urged any available objection before the Board. Certainly Grace knew all of the facts known

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to the Court, and it was not suffering from any disability or lack of adequate representation by counsel.

Similar statutory provisions have been accorded greatest deference by courts in other cases. In *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475, 477, 478 (C. C. A. 6th, 1943), the court held as follows:

> "Respondent and the System contend that none of these points can be raised in this court upon the ground that Section 24(a) requires as a condition precedent to the right to review an order of the Commission that the objections made shall have been urged before the Commission or that there were 'reasonable grounds for failure so to do.' • • • Under Section 24(a) • • • consideration is forbidden of certain points raised here for the first time, such as that dissolution of the System cannot presently be made in advance of decision by the Commission as to action required of the subsidiary companies, or that the order is vague and uncertain • • • Since the Commission is not empowered to rule upon the constitutionality of statutes, the fact that the constitutional objections were not raised before it, as a matter of abstract justice perhaps should not preclude the assertion of such questions in this court. But the wording of Section 24(a) is inclusive enough to embrace every kind of question, whether of law or fact. The Commission was established by congressional enactment, and the right to review its order likewise is given by Congress. Conditions under which the right may be exercised are within the power of the Congress to define, and one condition is that any question relied on in this court must have been urged before the Commission. We conclude that the constitutional questions are not before us."

It would seem obvious that, if questions which could not be decided by the administrative agency are nevertheless beyond the power of a court to review on appeal where they have not been presented to the administrative agency, the question on which the Court based its decision in this case could not properly be considered by the Court. The Board had full power to determine whether or not Grace's "petition" under Docket 707 could be considered an application filed on behalf of Panagra. As a matter of fact, the Court itself has held that the Board is in a far better position to determine this question than is the Court. It follows that this is precisely the type of case which Congress contemplated in Section 1006(e) of the Act, and that the Court is therefore forbidden to consider the objection to the Board's order which forms the basis for the Court's decision.

We also call the Court's attention to the following additional decisions relating to statutory provisions similar to Section 1006(e) of the Act. In *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9th, 1943) the court said:

> "No such issue was raised affirmatively by respondents in their pleadings, at the hearing before the Board, in their exceptions to the Trial Examiner's intermediate report which recommended reinstatement with back pay, or in their briefs in support of said exceptions. Although the Phelps Dodge decision was rendered approximately six months before that in the instant case, respondents at no time contended before the Board that any employee had wilfully incurred losses which should be deducted. Not having objected on this ground when the matter was before the Board, respondents are now barred by Section 10(e) of the Act from raising the point."

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This Court made a similar holding in *National Labor Relations Board* v. *Elvine Knitting Mills*, 138 F. (2d) 633, 634 (C. C. A. 2d, 1943). The Court there said:

> "In a supplemental brief respondent asserted that the Board's petition was barred by reason of a statute passed after the petition was filed in this court * * * The Board * * * asserts that such a claim is not within our powers of review, under §10(e) of the Act, 29 U. S. C. A. §160(e) * * * contentions which we understand respondent substantially conceded in the argument and with which we agree." See also *Armour & Co.* v. *Brown*, 137 F. (2d) 233, 239 (Emergency Court of Appeals, 1943).

It is to be noted that the statutory provision referred to by the Court is quite similar to Section 1006(e) of the Civil Aeronautics Act, as it provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

An analogous situation is presented by the cases in which courts have refused to remand to the administrative agency for the taking of further evidence where the party had not sought to introduce such evidence at the time of the original hearing. In *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 497 (C. C. A. 3d, 1943), the court said:

> "Since the Company thus had full opportunity to offer its evidence upon these alleged wrongful acts before the Board, but failed to take advantage of it, the Company is not now entitled to a second opportunity."

In *Athens Roller Mills* v. *Commissioner*, 136 F. (2d) 125, 128 (C. C. A. 6th, 1943), the court said:

> "There would be no assurance of any end to litigation over taxes if either the taxpayer or the Commissioner could raise on appeal new issues of fact which facts were in the possession or available to the party before the hearing by the Board."

It is submitted that, if the parties are to be prevented from raising new issues of fact or law on appeal, the reviewing court itself clearly should not prolong and complicate the litigation by adding new issues *on its own motion.*

In view of Section 1006(e) of the Act and the uniform judicial decisions construing similar statutory provisions as prohibiting consideration on review of issues not raised before the administrative agency, we submit that this Court cannot properly consider the point on which its decision rests in this case. Having determined that the objections which were raised by Grace before the Board and the Court have no substance, the Court's only remaining duty is to affirm the Board's order.

We wish to point out in passing that, not only did Grace not raise before the Board or the Court the objection to the Board's order on which the Court's decision appears to be based, but that objection is directly contrary to the position taken by Grace throughout the proceeding. It is obvious that, if the Board were to find that Grace's petition under Docket 707 was an application filed on behalf of Panagra, it would be required under this Court's mandate to decide the issues relative to Section 411 of the Act raised in Grace's petition under Docket 744. In other words, the Court's opinion apparently instructs the Board that it may find Docket 707 to be an application on behalf of Panagra only

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if it finds that Pan American is guilty of the practices prohibited under Section 411.

Grace has consistently taken the position throughout the proceeding that the issues raised in Docket 744 with respect to Section 411 of the Act have no relationship to the proceeding under Docket 779. As the Court's opinion points out, Grace's petition for review addressed to this Court specifically stated as one of the alleged errors by the Board that:

> "The Board erred in taking into consideration, as bearing on its jurisdiction under Section 401(h) of the Civil Aeronautics Act, any controversy between the co-owners of Panagra" (Tr. 146-147).

Thus, far from asserting that the Board should look into the conflict between Grace and Pan American and into the practices of Pan American with which Grace has taken issue, Grace objected to the Board's having so much as mentioned those matters in its opinion.

The Court's opinion further quotes Grace's position prior to the hearing before the Board as to the issues which should be considered under Docket 779. Grace then asserted that:

> "the scope of Docket No. 779 does not include the issues raised by Grace in Docket No. 744 with respect to Section 411 • • • If the Board wishes to pursue this subject (questions of corporate control and management) further, it should grant the petition of Pan American for an investigation under Section 415 of the Civil Aeronautics Act, just as it should institute proceedings under Section 411 as requested by Grace in Docket No. 744 if it wishes to pursue all the questions raised by Grace in Docket No. 744. These, we

submit, should, in any event, be separate proceedings from the instant one, so as not to delay or obstruct the prompt disposition of this proceeding. Grace does not believe that the Board should go into those issues here or the extensive and complicated issues as to the applicability of Section 408 when it is abundantly apparent that neither Section 408, 411 or 415 is relevant to the instant proceeding."

There are many other indications in the record that Grace strongly felt and urged that the issues involved in Section 411 of the Act and Docket 744 should not be considered under Docket 779. Some of those indications have already been set forth in the supplemental briefs filed by Eastern, Pan American and the Board, and they will not be repeated here.

As previously demonstrated, it is irregular and improper for a reviewing court, under facts and circumstances similar to those in this proceeding, to consider objections not raised before the administrative agency. It is even more extraordinary and irregular for the reviewing court *to originate* an objection never suggested by a party even on appeal, and it is most unusual, and we think it is improper, for the reviewing court to originate an objection which is directly contrary to the position taken throughout the proceeding and on appeal by the party in whose favor the reviewing court renders judgment. We submit that it is not the function of a reviewing court, in the very limited type of review authorized by Congress under the Civil Aeronautics Act, to suggest arguments not made by counsel, and which counsel could not have suggested in view of prior positions and stipulations made by such counsel.

It should be observed in this connection, that the action of the Court in deciding the case on an issue never raised

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by any party, and not clearly indicated in any communication from the Court to the parties, has had the effect of depriving the parties of the fair hearing to which they are entitled. We again call the Court's attention to the following language from *Morgan* v. *United States*, 304 U. S. 1, 18 (1938):

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one."

We also call attention to the further language of the Supreme Court in the *Morgan* case (304 U. S. 1, 19-20) demonstrating that courts, fully as much as administrative agencies, are required to grant a fair hearing:

> "Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

The only suggestion which even pretends to justify the Court's consideration of a point not raised before the Board is mentioned in the "Appendix" to the Court's opinion, which, as we understand it, sets forth the arguments which the Court did *not* adopt. It is there stated that:

> "Grace replies that it objected to the Board's rejection of jurisdiction; and, since the Board's failure to act under §411 involved a refusal by the Board to exercise its jurisdiction, Grace's objection was sufficient to raise that issue here, especially as Grace's right to maintain court review derives from the fact that it is vindicating the public interest, and this is not ordinary litigation between private persons."

Reference is also made in a footnote to the fact that Grace's petition contains a general prayer for relief.

Obviously such general objections or prayers for relief cannot satisfy Section 1006(e) of the Act. In the first place, the prayer for relief is directed to the *Court*, not to the Board. In the second place, Section 1006(e) would be vitiated completely if its requirements were held to be met by a mere general objection to the Board's action. The plain purpose of the Section is to require objections to be *specified* so that the reviewing court will have the benefit of the Board's expert ruling on the subject. Moreover, it is to be noted that all actions of the Board under the Act are required to be in the public interest or in accordance with the public convenience and necessity. Hence it would be possible for any party seeking review in any case to assert that he was "vindicating the public interest."

Congress, in passing Section 1006(e) was not doing a useless thing. The Court should not render that essential provision of the statute nugatory by any such interpretation as that suggested in the language quoted above.

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## II

### Grace's Petition Under Docket 707 Could Not Under Any Circumstances Be Considered an "Application" on Behalf of Panagra, and in Any Event It Cannot Be Considered in the Proceeding Under Docket 779.

The Court's opinion appears to order the Board to determine whether Grace's petition under Docket 707 is an application on behalf of Panagra, but the Court at the same time seems to restrict the Board's inquiry to the question whether Pan American has improperly prevented Panagra from filing an application. We submit that this action of the Court is erroneous on both counts.

In the first place, the Board has already found that no application has been filed on behalf of Panagra. At least twice in its opinion (Tr. 11, 20) the Board referred to the "absence of an application from Panagra." This plainly constitutes a finding that no application had been filed. The findings of fact of an administrative agency are conclusive. *Helvering* v. *Kehoe*, 309 U. S. 277, 279 (1940); *National Labor Relations Board* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, 281 (C. C. A. 2d, 1943). Legal interpretations by an administrative agency "will not be disturbed except for weighty reasons." *Brewster* v. *Gage*, 280 U. S. 327, 336 (1930).

Far from having "weighty reasons" for rejecting the Board's finding that no application on behalf of Panagra was pending, and far from discovering "no evidence" to support that finding, the Court's opinion apparently *assumes* that the Board did not even consider the matter, and seeks to restrict the Board's discretion in deciding the question,

The Court apparently feels that it was the Board's duty to consider whether the petition under Docket 707 was an "application". Yet the Court *assumes* that the Board did not perform that duty when it made its finding that no application had been filed. The contrary assumption is required. It is the established rule that an administrative agency is presumed to have performed its duty in the absence of proof to the contrary. There is no proof to the contrary in this case.

The plain fact is that Grace's petition under Docket 707 is not an application. The Board's regulations (Section 238.1), adopted pursuant to express authorization under Section 401(b) of the Act, make many requirements concerning "applications for certificates of public convenience and necessity *or amendments thereof.*" Those requirements are not met by the petition under Docket 707. For example, the petition did not name any "applicant," identify any route applied for, specify the types of service to be performed, set forth a map of the routes proposed, or state the type of aircraft to be used, etc.

We are at a complete loss to understand how the Court could make any determination whatever concerning the nature of Docket 707. Grace's petition is not a part of the record, although Grace improperly quoted it in an appendix to its supplemental brief. Apparently the Court jumped to the conclusion that the petition under Docket 707 could be an application merely because it referred to "public convenience and necessity." This is obviously not true, as any kind of document (motion, brief, etc.) filed with the Board might refer to "public convenience and necessity."

The Board is in the best position to construe its own rules, and it properly held that no application had been filed. This Court has no power to order the Board to disregard the rules authorized by the Act, or to require the

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Board to consider entirely different factors in determining what is an application.

A footnote to the Court's opinion states that:

> "The Board tells us that in other cases it has treated consents by carriers, filed in s. 401(h) proceedings, as voluntary petitions for extensions under §401(d). We think that a correct conclusion."

We have found nothing in the record or the briefs to support such a statement, and we know of no instance in which the Board has held that a mere "consent" can be considered an application in the absence of an actual application broad enough to cover the extension involved.

In passing, it may be noted that in the hearing under Docket 779 Grace was given the status of an intervenor, and thus had the right to cross-examine the witnesses representing Panagra. If it had been considered an applicant, it would not have had that right—certainly a very substantial one. Hence, the record in Docket 779 would be seriously prejudicial to other parties if it were now to be used to decide a supposed "application" filed by Grace. Procedural defects of this nature are essentially prejudicial. *Edwards* v. *United States*, 312 U. S. 473, 482 (1941).

Even assuming that the petition under Docket 707 could be considered an application, Grace has no right to, and the Court has no power to compel, the inclusion of said petition in Docket 779. The Court's decision that Docket 707, as an application, must be considered by the Board under Docket 779 appears to be based on the misapprehension that Grace otherwise would be improperly denied a hearing because other applications for service in the same area might, in the meantime, be granted and might foreclose the proposal for extension of Panagra. There are many fallacies in that theory.

There is nothing whatever in the record of this case indicating that other applications might be granted before Grace could obtain decision on Docket 707, and there is certainly nothing in the record to suggest that any such applications would preclude the extension of Panagra as desired by Grace. Grace sought in its supplemental brief to bring to the Court's attention certain matters *not in the record*, and the Court has quoted such material in a footnote to its opinion. (Even this material would not support the theory suggested in the Court's opinion.)

It is well established that a reviewing court cannot rely upon evidence not in the record. *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 72 (1936); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. (2d) 263, 267 (C. C. A. 8th, 1943). In *National Labor Relations Board* v. *Newport News Co.*, 308 U. S. 241, 249-250 (1939), the Court said:

> "The court below, in its opinion, states it was advised in a brief after the hearing in that court, that the plan had been amended by striking out the provisions in question. It concluded, therefore, that their previous existence is immaterial. The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record as certified by the Board."

Since there is nothing in the record to support the conclusion that any rights of Grace or Panagra might be prejudiced by delay in hearing of Grace's petition under Docket 707, there is no support for the Court's reliance on *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. (No. 65, December 3, 1945). That case involved a situation where *the administrative agency itself*

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had held that two applications were *mutually exclusive*. The Court held that, under such circumstances, the granting of one application without a hearing effectively denied the second applicant of a hearing.

No such facts exist in this record, and the Court's decision appears to be based solely on speculation with respect to this point. The Court's further remarks on the subject amount to a finding that, merely because a record has already been made in Docket 779, Grace is entitled to a preferred hearing even though in order to grant such a preference the Board must rule contrary to the position of Grace and all parties and hold that Docket 707 amounted to an application on behalf of Panagra which must be considered in Docket 779. Such a position is completely negatived by the decision in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), where, although a record had been made in a prior hearing, the Court held that the Commission could not be required to decide the case on that record but had full freedom to require the making of a new record. The Court there said:

> "• • • the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interests."

The Court's solicitude for Grace is entirely out of keeping with the history of this case. Grace has at all times

taken the position that the proceeding under Docket 779 must be carried on and decided entirely apart from other proceedings involving service in the same area. The Court has noted in its opinion that Eastern sought consolidation of its application involving Caribbean service with Docket 779. The Court did not note, though the record shows, that Grace vigorously opposed the consolidation and took the position that the two matters were not related in any way. See Grace's "Motion of Opposition" dated September 13, 1943 and filed September 14, 1943 in Docket 779. Grace then said, among other things:

> "The issue is rather whether the Board may hold a hearing to consider whether a great international airline, Panagra, with an international network of almost 9000 miles connecting eight countries should run a direct through service to its natural terminal in the United States, which is the origin or destination of an important portion of its traffic * * *
>
> "This is the basic issue in Docket No. 779. It is a question which must be determined without regard to the applications of Eastern or any other airline * * * Dockets 779 and 782 present no such identity of issues which existed in the cases cited by Eastern in its petition" (page 2).
>
> "Eastern's application and the Board's proceeding in Docket 779 do not propose 'substantially the same type of service.' A connecting service provided by Eastern cannot possibly constitute an extension of Panagra's route to a United States terminal. To permit consolidation would not only 'enlarge the scope of this proceeding'; it would by the introduction of an entirely new and wholly unrelated issue entirely change the nature of the proceeding" (page 3).

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"There is no unfairness or any unique favor involved in the Board's deciding on its merits the only question involved in this proceeding" (page 4).

"In view of the issue in Docket 779 as above stated the time of the filing of Eastern's application for a route to the Canal Zone is of no importance. Likewise the question of competition does not control whether the public interest requires that Panagra extend its route to a United States terminal. Whether, quite apart from such extension further competition should be provided in this area is a separate question" (page 6).

It would be a most serious miscarriage of justice if Grace, which originally demanded preferred and separate hearing and denied that Docket 779 had any relation to other proposals for service in the Caribbean, were now to be given a far greater preference by having its petition under Docket 707 considered an application, and decided in a proceeding in advance of other applications, on the theory, now advanced for the first time, that otherwise the applications which Grace originally scorned as unrelated might foreclose Grace's proposal.

Grace has had every opportunity to obtain hearing on Docket 707. It could have demanded consolidation with Docket 779. It could have demanded consolidation with other applications in proceedings involving the same area. It did not do so. Instead it deliberately relied on the proceeding started on the Board's own motion under Docket 779. We submit that it is not a part of a reviewing court's function to give parties a second or third guess as to the best procedural course to take. We cannot believe that the Court will wish to embark on a program of ordering consolidated or preferred hearings for applicants who have

deliberately kept their applications out of consolidated proceedings. If the Court were to do such a thing there are dozens of other cases where the Court's similar action would be equally appropriate.

As the Court pointed out in the *Pottsville* case, *supra* (309 U. S. 134, 146):

> "But courts are not charged with general guardianship against all potential mischief in the contemplated tasks of government * * * Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."

To this statement may be added the remark that too much direction by courts of administrative agencies would lead to disruption of administrative proceedings and the deprivation of substantial rights. In the present case, the Court's mandate would require the Board to rule on Grace's charges against Pan American, while depriving Pan American of the right to prove its charges against Grace.

The Court seems to have assumed that the only issues under Section 411 of the Act are those raised by Grace, charging Pan American with improper practices relative to Panagra. It must be remembered that Pan American has filed equally serious charges against Grace. There are indications in the record that Pan American will be able to substantiate its charges if given an opportunity. As the Board's procedure is now set up, all these charges and counter-charges will be aired and decided at the same time under Docket 744. Obviously that is the proper procedure. The Board can then rule whether Grace or Pan American (or both) should surrender control of Panagra. This is precisely the procedure urged by Grace in its statement, quoted in the Board's opinion, that "If the Board wishes to pursue

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this subject further, it should grant the petition of Pan American for an investigation under Section 415 of the Civil Aeronautics Act, just as it should institute proceedings under Section 411 as requested by Grace in Docket No. 744."

It would completely demoralize this orderly procedure if the Court were now to compel the Board to decide Grace's charges as a part of Docket 779, while deferring Pan American's charges for a later hearing. It would further deprive Pan American of the hearing to which it is entitled. We respectfully submit that the Court should not, by its mandate, prevent the Board from carrying out its duties properly or disable it from achieving substantial justice.

Finally, we submit that Grace has no standing to file an application on behalf of Panagra. The *American Power and Light Co.* case (65 Sup. Ct. 1254 [U. S. 1945]), cited by the Court, does not establish any standing on the part of Grace. That case did not hold that a mere charge by a stockholder of fraud and illegality on the part of management would be sufficient to permit the stockholder to maintain an appeal. So far as the facts of that case indicate the holding, a shareholder must still prove that the administrative order will be positively harmful to him before he has the right to appeal. Grace could not prove or even claim any harm whatsoever from the failure of the Board to extend Panagra's route. Such failure merely leaves Grace and Panagra where they were. We submit that the Supreme Court did not intend in the *American Power and Light Co.* case to open the door to indiscriminate prosecution of applications for expanded operations by shareholders merely on the allegation that the management had wrongfully refused to apply.

WHEREFORE, Eastern Air Lines, Inc. prays that a rehearing be granted with respect to the decision of this Court, dated January 28, 1946 in this case, and upon such rehearing that the order of the Civil Aeronautics Board under review in this case be affirmed.

Respectfully submitted,

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*Attorneys for Eastern Air Lines, Inc.*

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
*Of Counsel.*

New York, N. Y.
February 11, 1946.

## Certificate of Counsel

I, W. GLEN HARLAN, Attorney and Counsel for Eastern Air Lines, Inc., Petitioner, hereby certify that the above petition for rehearing is presented in good faith and not for delay.

Dated, February 11, 1946.

W. GLEN HARLAN
*Attorney for Petitioner*

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[fol. 115] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., et al., Respondents.

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[fol. 116] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 92

(Petitions for Rehearing Submitted February 11, 1946. Decided February 21, 1946.)

Docket No. 19520

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., et al., Respondents.

Before L. Hand, Swan and Frank, Circuit Judges

ON PETITIONS FOR REHEARING

Henry J. Friendly (James P. Kranz, Jr., and John P. Apicella, of counsel) for Pan American Airways Corporation; Gambrell & White (E. Smythe Gambrell, W. Glen Harlan and Harold L. Russell, of counsel) for Eastern Air Lines, Inc.

[fol. 117] PER CURIAM:

Pan American and Eastern have filed petitions for rehearing which we deny but which make desirable some additional comments.

1. The petitions complain that we have held that the Board may and should consider a "private dispute between

stockholders" relating solely to the question "whether one stockholder has acted prejudicially to the corporate welfare." That complaint overlooks this basic assumption of our opinion: As the Board itself recognized in the recitals of its order of September 10, 1942, the declared policy of Congress set forth in § 2 of the Act not only makes paramount the "public interest" but also explicitly includes as an important factor, vitally affecting the public interest, "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." If, as that order of the Board indicates, the facts brought out at a hearing should show that the public interest required competition between Panagra and Pan American's wholly owned subsidiary, and that Pan American was improperly using negative control of Panagra to interfere with such competition, then the Board might find it necessary to take steps, authorized by that Act, to prevent such interference as prejudicial, not to Panagra's "corporate welfare," but to the public interest. Of course nothing we have said is to be understood as precluding the Board from considering and deciding, in this or any other proceeding, whether Grace is violating § 408. Nor are we intimating that, should the Board find that Grace is violating § 408 and that Pan American is also improperly using its stock interest in Panagra, the Board may not exercise its statutory powers to rectify the situa- [fol. 118] tion in any way it deems wise.[1] It should go without saying that (although the record is already voluminous and seems to cover all these issues) the Board should give all parties the opportunity to offer additional, relevant evidence unless the Board, in the exercise of sound discretion, rules that it is needlessly cumulative.

2. Pan American, in its rehearing petition, concedes that "the overall purpose of the statute is the advancement of the public interest by the promotion of civil air service." That purpose, permeating this case, both before the Board and in this court, serves to dispose of the contention that in our decision we have exceeded our powers of review.

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[1] We do not have (as Eastern somewhat recklessly suggests) any "solicitude for Grace."

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Grace, before the Board, objected to the dismissal of the proceeding for want of jurisdiction in the Board; in its petition for review, Grace prayed "for such other relief as to the court may seem just and proper in the circumstances." With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large.[3] Accordingly, since this is not mere private [fol. 119] litigation, overly nice scrutiny of the pleadings and undue stress on alleged stoppels [3a] have no place here.[3a]

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[3] *F. C. C.* v. *Sanders Radio Station*, 309 U. S. 470; *Scripps-Howard Radio* v. *F. C. C.*, 316 U. S. 4; *F. C. C.* v. *N. B. C.*, 319 U. S. 239, 247; *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. —.

In the *Scripps-Howard Radio* case, the Court said (pp. 14-15): "But these private litigants have standing only as representatives of the public interest. *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 477. Compare *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362-63. That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights • • • Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes."

See *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2) for discussion of the development of this doctrine; there (at 704) we suggested that those who come within the class of persons who may seek review, under review provisions like that here, may be considered "private Attorney Generals."

[3a] Grace, before the Board, objected to consideration in this proceeding of its petition No. 744 with respect to § 411. We do not (as Eastern erroneously suggests) instruct the Board to consider § 411, although it may do so if it wishes and although it may be that, in considering Grace's petition No. 707, it may be necessary to deal with much the same issues as would arise under § 411.

It is to be noted that Pan American before the Board referred to "Grace's complaints in Dockets No. 707 and 744, which form the background of this proceeding."

[3a] Cf. Mercoid Corp. v. Mid-Continent Co., 320 U. S. 661, 670.

Eastern argues that *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, shows that we have illegitimately intruded on the Board's discretion as to the order in which it chooses to consider matters pending before it. But the Supreme Court rejected that same suggestion in *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. —, as the dissenting opinion in that case discloses. The unmistakable fact is that, of recent years, there has been a steady development in Supreme Court decisions of the doctrine that those seeking review of the orders of administrative agencies, under review provisions like § 1006 of this Act, are primarily vindicating the public, not a private, interest.[4] It is our duty to follow the lines laid down by that Court, and we have done so here according to our lights.

3. It is urged that in our discussion of *American Power & Light Co.* v. *Securities & Exchange Commision*, 325 U. S. 385, we neglected the fact that it turned on the extensive powers and duties of the S. E. C. under the Public Utility Holding Company Act which include protection of the interests of investors and therefore authorize administrative scrutiny of the relations between stockholders and their corporations. But that contention disregards the numer- [fol. 120] ous provisions of the Civil Aeronautics Act directing and authorizing the Board, in safeguarding the public interest and in carrying out the declared policy of the Act, to investigate, supervise, and do the needful, with respect to the management and control of air carriers.[5] In the light of those provisions, we reject Pan American's argument that the Board lacks all "power to take the management of a corporation out of the hands of its directors." It was with those provisions in mind that we said that exploration of the issues of alleged "fraud" or "illegality" in the management and control of Panagra demand the Board's "specialized acquaintance with commercial aviation and its ramifications." *Pittsburg, etc. R. Co.* v. *United States*, 281 U. S. 479, involved nothing like the public interest patently here involved; moreover, that case was decided before the recent doctrinal development above noted. We see nothing in *Schenley Distillers Corp.* v. *United States*, — U. S. — (January 2, 1946) to induce a different conclusion.

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[4] See cases cited, *supra*, note 2.

[5] See §§ 407, 408, 409, 411, 412, 413, 415; *cf.* § 1 (a).

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4. Objection is made to the fact that in a footnote we referred to the Latin American Proceeding (Docket No. 525) because this is a matter not in the record before us. The Board in one of its briefs called our attention to the existence and nature of that proceeding. Whether, since it relates to subsequent happenings in the Board affecting the case here, we may not properly consider it is not entirely clear.[6] But we did not, in any way, rest our decision thereon, using it merely to illustrate the obvious point that the Board's long delay in passing on Grace's petition filed December 16, 1941, might, through intervening circumstances, render the Board impotent—should it later take [fol. 121] up that petition and decide it in favor of Grace—to do that which would be in the public interest.

5. We were in error in saying in a note to our previous opinion that the Board had told us that in other cases it had treated consents, filed in § 401 (h) proceedings, as voluntary petitions for extensions under § 401 (d). But we adhere to the view that a consent by a carrier to a 401 (h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier.

6. To avoid misunderstanding, we repeat that we are not prejudging any of the issues of fact. We have not examined the record as to the merits. That is the Board's function.

Petitioners for rehearing denied.

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[6] *Cf. Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 466; *Patterson* v. *Alabama*, 294 U. S .600, 607.

[fol. 122] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of February, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

W. R. GRACE & Co., Petitioner,

v.

CIVIL AERONAUTICS BOARD, et al., Respondents

Petitions for a rehearing having been filed herein by counsel for the respondents, Pan American Airways Corporation and Eastern Air Lines, Inc.,

Upon consideration thereof, it is

Ordered that said petitions be and hereby are denied.

Alexander M. Bell, Clerk.

[fol. 123] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. W. R. Grace & Co., v. Civil Aeronautics Board, et al. Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 21, 1946. Alexander M. Bell, Clerk.

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[fol. 124] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 25th day of February, One thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

No. 19520

W. R. GRACE & Co., Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents

This cause came on to be heard on the petition of W. R. Grace & Co. for review of three orders of the Civil Aeronautics Board, dated December 17, 1943, May 24, 1944 and August 5, 1944, and on the transcript of the record from the Civil Aeronautics Board, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decree-, on motion of Cahill, Gordon, Zachry & Reindel, Attorneys for Petitioner, W. R. Grace & Co., that the said orders of the Civil Aeronautics Board, dated December 17, 1943, May 24, 1944 and August 5, 1944 be and they are hereby set aside and that the proceedings [fol. 125] designated as Civil Aeronautics Board Docket 779 be and it hereby is remanded to the Civil Aeronautics Board for further proceedings in conformity with the opinion of this Court, dated January 28, 1946.

(Sgd.) Learned Hand, United States Circuit Judge; Thomas W. Swan, United States Circuit Judge; Jerome N. Frank, United States Circuit Judge.

Filed February 25, 1946.

[fol. 126] [Endorsed:] No. 19520. In the United States Court of Appeals for the Second Circuit. W. R. Grace &

Co., Petitioner, against Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents. Notice and Proposed Counter-Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 25, 1946. Alexander M. Bell, Clerk.

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[fol. 127] UNITED STATES OF AMERICA,
Southern District of New York:

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from A. 1 to 14; B. 1 to 149; C. 1 to 39; D. 1 to 71; E. I to XIII; F. 14 to 18; G. 1 to 42; H. I to XII; I. 699 to 733; J. 1 to 18; K. 1 to 23; and L. 1 to 11; inclusive, contain a true and complete transcript of the printed parts of the record and proceedings had in said Court, in the case of W. R. Grace & Co., Petitioner, v. Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 17th day of April, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventieth.

Alexander M. Bell, Clerk. (Seal.)

[fol. 128] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1945

No. ——

PAN AMERICAN AIRWAYS CORPORATION, and PAN AMERICAN AIRWAYS, INC., Petitioners,

vs.

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, EASTERN AIR LINES, INC., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, as follows:

1. The printed record for use in the Supreme Court of the United States on petition for certiorari in the above cause shall consist of the appendices to the briefs and to the supplemental briefs of the petitioner Pan American Airways Corporation and respondents W. R. Grace & Co., Eastern Air Lines and the Civil Aeronautics Board filed in the United States Circuit Court of Appeals for the Second Circuit in Docket No. 19520 together with the proceedings in the Circuit Court of Appeals which shall be certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit.

2. Since all of the respondents have heretofore received copies of the appendices to the briefs and supplemental briefs filed in the Circuit Court of Appeals for the Second Circuit, all of the respondents hereby expressly waive serv-[fol. 129] ice on their respective counsel, as provided for by paragraph 3 of Rule XXXVIII of the Supreme Court of the United States, of a copy of such portion of the printed record to be filed in the Supreme Court of the United States in connection with the aforesaid petition for certiorari which consists of the said appendices.

3. The petitioners will cause the Clerk of the United States Circuit Court of Appeals for the Second Circuit to

certify and file with the Clerk of this Court the entire transcript of the record in original form as filed by the Civil Aeronautics Board in the Circuit Court of Appeals for the Second Circuit in Docket No. 19520, and if said Clerk so requires the parties hereto will consent to the entry of an order by this Court or by the United States Circuit Court of Appeals for the Second Circuit directing that said entire transcript of the record be certified and filed with this Court.

4. Petitioners will file with the Clerk of this Court, as an appendix to their petition and brief, one copy of (a) the letters from the Circuit Court of Appeals for the Second Circuit to parties dated November 29, 1945 and December 3, 1945, (b) the letters from certain parties to that Court dated December 12 and December 17, 1945, and (c) all of the briefs and supplemental briefs filed by the parties in the Circuit Court of Appeals for the Second Circuit in Docket No. 19520; and all of the respondents hereby expressly waive service on their respective counsel as provided for by paragraph 3 of Rule XXXVIII of this Court, of a copy of this appendix.

5. If any of the respondents named above file petitions for certiorari in their own behalf, the record, as certified by the Clerk of the United States Circuit Court of Appeals [fol. 130] for the Second Circuit pursuant to paragraphs 1 and 3 hereof, shall be entitled in each of such causes.

6. Any of the parties hereto may refer in the petitions and briefs to any portions of the certified transcript of record which are not included in the printed record to be filed in accordance with this stipulation, and to any portions of the appendix referred to in paragraph 4 hereof.

7. In the event that certiorari is granted, the printed record shall consist of the printed record prepared for use on petition for certiorari as described in paragraph 1 hereof and such portions of the entire transcript of record certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit as the respective parties may designate, and petitioners will print, or otherwise reproduce in a form satisfactory to this Court, as an appendix to their brief, such portions of the appendix referred to in para-

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graph 4 hereof as they or the other parties hereto may designate.

Dated, April 10, 1946.

Henry J. Friendly, Counsel for Pan American Airways Corporation and Pan American Airways, Inc.; Fred J. Knaur, Counsel for W. R. Grace & Co.; J. Howard McGrath, Solicitor General of the United States for and on behalf of the Civil Aeronautics Board and the Department of Justice of the United States of America; E. Smythe Gambrell, Counsel for Eastern Air Lines; Wm. I. Denning, Counsel for National Airlines, Inc.; W. Clifton Stone, Counsel for Chicago & Southern Air Lines, [fol. 131] Inc.; (Copy illegible), Counsel for TACA, S. A.; W. F. Creswell, H. Preston Morris, Counsel for Pan American-Grace Airways, Inc.

[fol. 132] [Endorsed:] In the Supreme Court of the United States. October Term, 1945. No. —. Pan American Airways Corporation, and Pan American Airways, Inc., Petitioners, vs. W. R. Grace & Co., Civil Aeronautics Board, Eastern Airlines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents. Stipulation.